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No. 10-980

Supreme Court, U S
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IN THE

Supreme Court Of The United States

EVAN GRIFFITH,

Petitioner,

v.

DAVE REDNOUR, DIRECTOR
MENARD CORRECTIONAL CENTER,

Respondent.

On Petition for Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RODERICK MACARTHUR JUSTICE CENTER, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, ILLINOIS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE ILLINOIS PUBLIC DEFENDERS ASSOCIATION, AND THE ILLINOIS OFFICE OF THE STATE APPELLATE DEFENDER AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The questions presented are:

1. Did the Seventh Circuit erroneously apply this Court's decisions in Carey v. Saffold, 536 U.S. 214 (2002) and Evans v. Chavis, 546 U.S. 189 (2006), and create a conflict with the approach taken by other circuits when it ruled for purposes of the statute of limitations in AEDPA that the Illinois Supreme Court could not make a state Petition for Leave to Appeal "timely" by granting a retroactive 14-day extension of time pursuant to established state court rules and decisions?

2. Whether the Seventh Circuit erred in ruling that the one-year statute of limitations in AEDPA governing a federal habeas corpus petition should be enforced — and review on the merits denied — against a petitioner who presents a credible claim of actual innocence?

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INTEREST OF AMICI CURIAE[1]

The Roderick MacArthur Justice Center at Northwestern University School of Law is a public interest law firm founded in 1985 to advocate for social justice and human rights through litigation. The MacArthur Center is a prominent member of the Illinois civil rights community. Among the Center's interests is the right of convicted persons to full and meaningful review of their convictions.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and the appropriate application of criminal statutes in accordance with the United States Constitution.

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1 Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

The National Legal Aid & Defender Association (NLADA), founded in 1911, is this country's oldest and largest nonprofit association of individual legal professionals and legal organizations devoted to ensuring the delivery of legal services to the poor. For one hundred years, NLADA has secured access to justice for people who cannot afford counsel through the creation and improvement of legal institutions, advocacy, training and the development of nationally applicable standards. NLADA serves as the collective voice for both civil legal services and public defense services throughout the nation.

The Illinois Public Defenders Association was incorporated in 1969 as a non-profit dedicated to education, training, procedural rule drafting, and representation for indigent defendants in Illinois.

The Illinois Office of the State Appellate Defender is a state agency created by the State Appellate Defender Act. The principal function of the Office of the State Appellate Defender is to represent indigent persons on appeal in criminal cases when appointed by the Illinois Supreme Court, the Appellate Court or the Circuit Court. One of the lawyers in the Office represented the Petitioner in the Illinois Supreme Court proceedings and filed the federal habeas corpus petition which is at issue in the certiorari petition. That lawyer is no longer with the Office, and the Office no longer represents Petitioner, Evan Griffith.

The Illinois Association of Criminal Defense Lawyers is a not-for profit organization dedicated to defending the rights of all persons as guaranteed by the United States Constitution. Its membership consists of private criminal defense lawyers, public defenders, investigators, and law professors throughout the State of Illinois. The mission of the IACDL is to preserve the adversary system of justice;

to maintain and foster independent and able criminal defense lawyers and to ensure due process for persons accused of crimes.

Amici, as organizations that consistently advocate for the fair and efficient administration of criminal justice, have a keen interest in assuring that tolling provisions in any statute are applied in a just and sensible fashion so that defendants are not caught in unwarranted procedural traps. Procedural rules, including timeliness requirements, vary considerably across jurisdictions. Accordingly, clarity as to the role that comity and federalism play in the proper interpretation of AEDPA's tolling provision is of the utmost importance to defense lawyers across the country. There is an acute need for a uniform federal approach as to the deference owed to state timeliness procedures; lawyers across the country rely on state procedural rules, as Griffith's lawyer did in this case, in calculating the federal statute of limitations.

SUMMARY OF ARGUMENT

This case presents this Court with an opportunity to clarify that deference to states is outcome neutral. The Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the habeas common law require deference to a state's rules and procedures both on the substance of the underlying issue, § 2254(d)(1), and as to the state's procedural rules. The Seventh Circuit has erroneously developed a body of habeas law that fails to recognize that such deference to state procedures applies whether it hampers or facilitates federal habeas review. *Amici* urge this Court to clarify the role of federalism and comity in the proper application of AEDPA's tolling provision.

In addition, *amici*, as representatives of criminal defense lawyers across the country, urge this Court to review this case in order to clarify the relationship between procedural traps and the preclusion of federal habeas review. Due process and the prohibition on suspending habeas corpus strongly suggest that the complete preclusion of federal review predicated on a procedural trap are of arguable unconstitutionality, and therefore, represent an unsound interpretation of § 2244(d)(2).

ARGUMENT

As demonstrated in Griffith's petition for a writ of certiorari, the United States Court of Appeals for the Seventh Circuit's interpretation of 28 U.S.C. § 2244(d)(2) is out of step with the approach taken by other circuit courts of appeals.

Amici, as representatives of criminal defense lawyers across the country, submit this brief in support of certiorari in order to elaborate on additional considerations that warrant review by this Court. Specifically, the Seventh Circuit's interpretation of § 2244(d)(2) is *conceptually* incompatible with the core tenets of federal habeas law and *pragmatically* untenable insofar as it creates procedural traps for habeas petitioners and procedural anomalies for habeas doctrine. Each of these concerns is discussed below.

I. PRINCIPLES OF COMITY AND FEDERALISM REQUIRE DEFERENCE TO STATE PROCEDURAL RULES BY FEDERAL HABEAS COURTS.

The first sentence of Justice O'Connor's opinion in *Coleman* v. *Thompson* reads: "This is a case about federalism." 501 U.S. 722, 726 (1991). In *Coleman*, federalism entailed deferring to the state's interpretation and application of its procedural rules in order to bar federal habeas review for a man sentenced to death. This Court explicitly deferred to the state's *own* interpretation of its timeliness rules. The state of Alabama was regarded as the master of its own procedures.

Griffith's case is also about federalism. In this case, federalism entails deferring to the state's interpretation and application of its procedural rules

so as to avoid precluding federal habeas review. As in *Coleman*, the question is whether a state's assessment of the timeliness issue warrants deference.

This Court has consistently recognized that federal habeas review should be animated by concerns for federalism and comity. *See, e.g.*, *Coleman*, 501 U.S. 722. AEDPA's tolling provision, § 2244(d)(2), is not in tension with these goals but instead "is designed to protect the principles of comity, finality and federalism." *Carey* v. *Saffold*, 536 U.S. 214, 222 (2002). The Seventh Circuit's interpretation of § 2244(d)(2), in contrast to most other circuits that have applied the provision, fails to accord any deference, much less sufficient deference to Illinois procedural rules. *Coleman*, 501 U.S. at 750–51 (denouncing federal habeas review that "undervalue[s] the importance of state procedural rules"). Consequently, the Seventh Circuit's approach undermines the comity and federalism serving function of AEDPA's tolling provision and needlessly creates a circuit split.[2] Stated another way, the Seventh Circuit fails to recognize that AEDPA deference to states is outcome neutral — that is, it applies whether it hampers review or facilitates federal review. Comity and federalism concerns are

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2 This Court's approach to the federal statute of limitations, consistent with safeguarding comity and federalism, recognizes that the operative term for purposes of tolling the federal statute of limitations, "pending," must be understood to include all state post-conviction procedures that are considered "timely under state law." *Evans* v. *Chavis*, 546 U.S. 189, 191 (2006). As discussed in the Petition for Certiorari, most circuits have expressly deferred to state law in determining whether a pleading is timely filed, and therefore, "pending" for purposes of § 2244(d)(2).

not outcome focused but address the careful balance between respect for state courts and their rules and the need for federal review.

The AEDPA one-year statute of limitations is hardly unique in its service of the goals of comity and federalism in federal habeas review. Comparable rationales justify the companion doctrines of exhaustion and procedural default and serve to limit federal review in a manner substantially similar to the statute of limitations — that is, generally precluding federal review when the prisoner fails to comply with state procedures. The application of each of these three doctrines is substantially contingent on state procedural rules. The Seventh Circuit overlooked the importance of enforcing a uniform, comity-enhancing national standard for enforcing state procedural rules.

In particular, the Seventh Circuit decision dictates that federal courts apply differently the exact same state procedural rules — *e.g.*, timeliness and time bars in state habeas — depending on whether the issue is one of exhaustion, default, or the statute of limitations. This non-uniform application of a state's procedural rules is anomalous, reflects insufficient deference to state law, and inappropriately suggests that the goals of comity and federalism are appropriate in hampering but not in facilitating federal review. Principles of comity and federalism ought not be applied in such a result-oriented manner; they serve to safeguard state procedures, whether the procedure helps or hurts a petitioner.

As explained in more detail immediately below, the regard for state law in the exhaustion and default contexts is incompatible with the approach taken by the Seventh Circuit in this case.

A. Exhaustion

Like the statute of limitations at issue in this case, the exhaustion doctrine, first announced in *Ex parte Royall*, 117 U.S. 241 (1886), and codified in 28 U.S.C. § 2254, serves as a limit on the circumstances in which a federal court may grant a state prisoner's claim for relief. Andrea Lyon et al., *Federal Habeas Corpus: Cases and Materials* 69 (2d ed. 2011) (explaining the relationship between exhaustion and the statute of limitations). The doctrine of exhaustion — requiring that the substance of a federal claim first be presented to the state courts, *Picard* v. *Connor*, 404 U.S. 270, 275 (1971) — is a federalism and comity enhancing rule, and it is fundamentally incompatible with the Seventh Circuit's interpretation of AEDPA's tolling provision. *Cf. Spruill* v. *Gillis*, 372 F.3d 218, 231 (3rd Cir. 2004) (examining the doctrine of exhaustion in a different context and noting that the doctrine serves a "defederalizing" function).

The exhaustion requirement promotes comity and federalism by requiring that state prisoners first present the state courts with a full opportunity to adjudicate the constitutionality of the underlying detention or sentence. Exhaustion, then, is designed to avoid the "unseemliness" of a federal bypass of the state system, and in the process "reduce[] friction between the state and federal court systems." *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 845 (1999).

Like exhaustion, this Court has explained that AEDPA's tolling provision is "designed to protect the principles of comity, finality, and federalism." *Carey* v. *Saffold*, 536 U.S. 214, 222 (2002). Exhaustion and tolling, then, should enjoy a mutually reinforcing symbiotic relationship. Notably, however, rather than reducing friction between federal and state

courts, the Seventh Circuit's application of AEDPA's tolling provision actually enhances dissonance between the respective sovereigns. Specifically, although the Seventh Circuit requires state prisoners to exhaust all claims in state court before proceeding to federal habeas review, the panel simultaneously refused to defer to Illinois state law regarding the proper procedures for exhaustion, in particular the question of the timeliness of Griffith's petition. This is exhaustion in form, but not in function.

To require a prisoner to pursue state review for purposes of exhaustion, only to ignore the state's procedural law governing that review, is to convert exhaustion into yet another doctrine of federal supremacy rather than a tool for respecting state sovereignty and enhancing comity. Whatever comity principles are enhanced in the abstract by an exhaustion requirement are surely undermined in practice if federal courts are free to disregard the procedural rules the state has designed to govern its exhaustion system.

The Seventh Circuit's crabbed reading of AEDPA's tolling provision may deprive the exhaustion requirement of its comity-enhancing function for an additional reason. In any case where the delay in filing a state pleading was both reasonably excusable under Illinois' *instanter* rule, and longer than one-year in duration, then, in order to comply with the federal statute of limitations, an Illinois prisoner would have to file a federal habeas petition raising claims that are still pending, and thus unexhausted, in state court. *Cf. Walker* v. *Martin*, __S. Ct. __, 2011 WL 611627 *8-9 (Feb. 23, 2011) (discussing a state post-conviction case from California in which a delay in filing of 14 months was regarded as reasonable and timely under state law). Such a result reflects an

intolerable retreat from the principles of comity embraced by the AEDPA, and an unwise allocation of scarce federal judiciary resources. *Cf. Lawrence* v. *Florida*, 549 U.S. 327, 335 (2007) (noting the relevance of considering "practical problems" or oddities in assessing an interpretation of § 2244(d)(2)).

In short, although exhaustion is generally intended to reduce the friction between state and federal courts, by refusing to honor the Illinois Supreme Court's decision, pursuant to its established rules and procedures, to grant a retroactive extension of the time-limit for requesting leave to appeal, the Seventh Circuit has heightened rather than eliminated procedural "frictions" between state and federal courts. The Seventh Circuit's approach in this case puts AEDPA tolling in tension with, rather than in the service of, exhaustion. *Carey*, 536 U.S. at 222–23 (recognizing AEDPA's tolling provision as serving the role of "promoting" state exhaustion free from "federal interference").

B. Procedural Default

Like exhaustion, the doctrine of procedural default, as interpreted by this Court, is "grounded in concerns of comity and federalism." *Coleman* v. *Thompson*, 501 U.S. 722, 730 (1991). And even more so than exhaustion, the procedural default rules can be seen as providing a companion framework for understanding the proper use of state rules in the statute of limitations context at issue in this case.

The general purpose of the procedural default doctrine is to ensure that a state is free to create and apply its own procedural rules to state habeas proceedings. *Id.* Subject to minimal constitutional constraints, states are free to craft parsimonious or

generous procedural rules for the regulation of state post-conviction litigation. The procedural default doctrine ensures that federal courts respect and defer to these state procedural rules by defaulting or precluding review in federal court when a petitioner fails to comply with the state rules. Viewed in this way, the significance of a procedural default doctrine is obvious: If federal courts failed to preclude federal review of claims that were improperly presented as a matter of state law, the state rules would quickly become a nullity. State prisoners could simply ignore state rules and proceed unfettered to federal habeas review.

Procedural default, then, functions to enhance comity and federalism by safeguarding the application and enforcement of state rules of procedure. The primacy of state law as to matters of state habeas is preserved. Accordingly, if a State wants to impose a "contemporaneous-objection" rule, for example, it may do so, and the rule will be given deference by the federal courts sitting in habeas. Likewise, if a state does not wish to impose a "contemporaneous-objection" requirement, the federal courts on habeas review must respect the absence of a procedural bar and review the merits of the claim. *See Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). It is the state's rule that trumps, not the federal court's preference. *Id.* (concluding that state trials and procedures should be the "main event" and not simply disregarded on federal habeas review).

In this case, far from treating Illinois' procedure for granting a retroactive extension of time to appeal as the "main event" and worthy of deference, the Seventh Circuit's decision concludes that "nothing a state court does" can render Griffith's petition timely and therefore pending for purposes of AEDPA.

Compare Griffith v. *Rednour*, 614 F.3d 328, 330 (7th Cir. 2010), *with Carey* v. *Saffold*, 536 U.S. 214, 220 (2002) (holding that a petition for state collateral review is "pending" as long as timely state post-conviction appeals are "in continuance"), *and Evans* v. *Chavis*, 546 U.S. 189, 191 (2006).

This approach to AEDPA's tolling provision undermines the core function of the procedural default doctrine. Although the Seventh Circuit may not regard the Illinois rule as particularly wise, or the most efficient use of judicial resources, comity nonetheless commands adherence to the state's rule. State procedural law as it is applied to state post-conviction procedures is entitled to deference, regardless of whether it meets with the approval of federal judges. *See Evans* v. *Chavis*, 546 U.S. 189, 198-199 (2006) (recognizing that the difficulty California's vague timeliness standard for appellate review presents for federal courts, but requiring the federal courts to apply the state rule as written).

Indeed, in two recent decisions this Court rejected a lower court's determination that a state procedural rule is "inadequate" and unenforceable because the rule is, like the Illinois procedure regarding *instanter* filings, "discretionary rather than mandatory." *Beard* v. *Kindler*, 130 S. Ct. 612, 615 (2009); *Walker* v. *Martin*, __S. Ct. __, 2011 WL 611627 (Feb. 23, 2011).

In *Martin*, this Court expressed approval for indeterminate state time limits for collateral relief applications, explaining that California's indeterminate, reasonableness standard permits the sort of discretion necessary to "take account of the gravity of a procedural failure, [or] the strength of the excuses offered." *Martin*, 2011 WL 611627 at *9 n.8 (quoting 16B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4026, p. 385-386 (2d

ed.1996)). Illinois' *instanter* procedure serves a similar function; it renders the time limit for appellate review indeterminate subject to a showing of extraordinary circumstances.[3] Cert. Pet. at 16 (compiling authority in support of Illinois' well established *instanter* procedure).

Likewise, in *Kindler*, without dissent, this Court corrected the federal court's unwillingness to defer to the state procedural rule in question:

> In light of the federalism and comity concerns that motivate the adequate state ground doctrine in the habeas context, it would seem particularly strange to disregard state procedural rules that are *substantially similar* to those to which we give full force in our own courts. *Id.* at 618 (emphasis added).

It appears that the Illinois rule permitting a retroactive extension of the statute of limitations is, indeed, "substantially similar" to a practice accepted by many federal and state courts.[4] Moreover, at the

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3 In *Carey* v. *Saffold*, 536 U.S. 214 (2002), this Court expressly approved tolling based on a discretionary state timeliness requirement. The California system deemed adequate to toll the federal statute of limitations in *Carey* is functionally equivalent to the *instanter* system used in Illinois insofar as both systems are "designed to be flexible" and permit judges to treat otherwise untimely appeals as timely so as to "correct miscarriages of justice." Id. at 235 (Kennedy, J., dissenting).

4 The dissent from the denial of rehearing *en banc* observed that "Federal courts often grant retroactive extensions of time." *Griffith* v. *Rednour*, 623 F.3d 1166, 1170 (7th Cir. 2010) (Hamilton, J., dissenting). Cases across the federal circuits appear to confirm this conclusion. *See, e.g.*, *Hung Viet Vu* v. *Kirkland*, 363 F. App'x 439 (9th Cir. 2010) (recognizing the accepted practice of applying *nunc pro tunc* procedures in federal district court to correct potential inequities); *Williams* v.

very least, the Illinois law governing *instanter* filings is well established in the rules and case law of the state, and any doubt should have been resolved in favor of the existence of such a rule. *See Beard* v. *Kindler*, 130 S. Ct. 612, 621 (2009) (Kennedy, J., concurring) ("A too-rigorous or demanding insistence that procedural requirements be established in all of their detail before they can be given effect in federal court would deprive the States of the case law decisional dynamic that the Judiciary of the United States finds necessary and appropriate for the elaboration of its own procedural rules.").

A state's rules governing the timeliness of state post-conviction appeal can serve as a procedural bar to federal proceedings, *Coleman* v. *Thompson,* 501 U.S. 722 (1991), *and* precisely the same rule provides the basis for determining the extent of tolling available under the federal statute of limitations, *Evans*, 546 U.S. at 192. Both the tolling provision of AEDPA, as interpreted in *Evans* and *Carey,* and the procedural default doctrine, as applied in cases like *Coleman*, serve the twin goals of comity and federalism.[5] Both require federal courts to consider

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Shinseki, 373 F. App'x 611, 616 (7th Cir. 2010) (accepting otherwise untimely briefs *instanter*); *Frazier* v *Moore*, 252 F. App'x 1 (6th Cir. 2007) (recognizing a state court's authority to enter judgments *nunc pro tunc*); *Morales* v. *Harry*, No. 08-12097-BC, 2009 WL 2885098 (E D. Mich. Sept. 1, 2009) (granting leave to file answer *instanter* a pleading that was one day late in a habeas proceeding).

5 The Seventh Circuit's approach creates an untenable procedural default paradox. If a prisoner seeks to avoid the application of a state procedural rule precluding relief, he must demonstrate cause and prejudice. *Wainwright*, 433 U.S. at 87. Under the Seventh Circuit's approach, however, when a state prisoner seeks to rely upon a state procedural rule to demonstrate that his claim is not defaulted, the federal court

state procedural rules. Deference by federal courts to the state's interpretation of the same rule — *e.g.*, a timeliness rule — is no more necessary or appropriate in one context than in the other. This case squarely presents this Court with an opportunity to establish firmly a uniform national standard for the treatment of the state procedural rules governing post-conviction litigation.

II. FAILING TO DEFER TO STATE PROCEDURAL LAW REGARDING THE TIMELINESS OF A STATE PETITION CREATES A TRAP FOR STATE PRISONERS.

Failing to defer to well established state law governing the timeliness of a state post-conviction appeal results in a procedural trap for state prisoners. Such a trap is undesirable as a practical matter and constitutionally dubious.

A. The Nature Of The Trap: One Way Discretion And Reliance On State Law.

The Illinois rule governing the timely filing of a petition for leave to appeal to the state supreme court is a discretionary rule. The rule requires that, as a general matter, petitions must be filed within 35 days; however, in the "most extreme and compelling circumstances" the state court "may extend the time for" seeking such leave. Ill. S. Ct. R. 315(b)(1).

Such an extension of the filing deadline is understood, as a matter of Illinois law, to render the filing retroactively timely. *See Wauconda Fire*

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can ignore or reject the state rule without cause. This sort of one way deference — observed only if it hurts the state prisoner — is both anomalous and inconsistent with the text of § 2244(d) and the goals of comity and federalism.

Protection Dist. v. *Stonewall Orchards, LLP*, 828 N.E.2d 216, 223 (Ill. 2005) (concluding that it is proper to permit a petition for leave to appeal to be filed "*instanter* after expiration of the filing deadline"); *Cf.* Ill. Prac., Illinois Civil Trial Procedure § 9:3 (2010) (defining a request to file *instanter*, in the pretrial context, as a request for the court "to accept tardy motions" as timely). In sum, Illinois procedure allows for a discretionary, retroactive extension of the time limits for a filing, and such was granted in this case.

In light of the Illinois *instanter* rule, the defining feature of this case is that a state court made a procedural ruling and a federal habeas court ignored this ruling. The Illinois Supreme Court determined that Griffith's petition for review was timely and the Seventh Circuit refused to honor this determination. By disregarding Illinois' application of its own exhaustion rule, the Seventh Circuit has created an unnecessary procedural trap, or lose-lose situation for someone in Griffith's position.

On the one hand, if the Illinois Supreme Court did not accept Griffith's motion for leave to appeal *instanter*, then his appeal was time barred, and his federal habeas petition procedurally defaulted. *Coleman* v. *Thompson*, 501 U.S. 722, 755 (1991). This is true even though the applicable state rule governing timeliness is apparently discretionary, providing the state courts with the authority, though not the obligation, to retroactively extend a filing deadline. *Beard* v. *Kindler*, 130 S. Ct. 612, 618 (2009) (recognizing discretionary rules as adequate state procedural bars).

On the other hand, where, as here, the Illinois Supreme Court accepts an otherwise untimely petition *instanter*, thus making it timely, the prisoner

is lulled into a trap regarding the proper time for filing his federal habeas corpus petition. A state prisoner aware that a state enforced time-bar is effective in precluding federal habeas review, would reasonably conclude that a state determination of timeliness would be accorded similar respect.[6] Under the Seventh Circuit's approach, however, a state prisoner who relied on the state court's timeliness determination would be lulled into a statute of limitations trap. *Cf. Spruill* v. *Gillis*, 372 F.3d 218, 231 (3d Cir. 2004) (concluding that "from a notice and due process point of view" it is generally appropriate for federal courts to defer to the procedural requirements of the forum entitled to exhaustion rather than creating a separate "common law on the subject" that threatens procedural incompatibility between the rules of the exhaustion forum and federal procedures).

A state prisoner who relied on the state court's determination that his otherwise untimely pleading was, under the *instanter* procedure, timely, procedurally proper, and therefore "pending" would be lulled into believing that he has more time remaining under the federal statute of limitations than the Seventh Circuit now recognizes as appropriate. *Cf. Chavis*, 546 U.S. at 198 (noting that if there is a "clear indication that a particular request

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6 The Illinois procedural rule in question, permitting *instanter* filings, despite the fact that it is discretionary rather than determinate, is entitled to deference. In fact, in the world of comity and federalism, a state court's enforcement of a discretionary — rather than determinate — decision creates greater federalism concerns, not less. The application of a discretionary rule reflects a situation where both the promulgators of the rule and its enforcers have considered, with at least some care, the appropriateness of the rule's application.

for appellate review was timely or untimely" that determination must be deferred to for purposes of AEDPA-tolling).

The Seventh Circuit approach purports to defer to state law insofar as it regards petitions deemed timely by the state court to be "properly filed." But this is an illusory promise of comity. The critical time — the gap-time between the original filing date and the date the petition is accepted *instanter* — will count against the petitioner for purposes of AEDPA tolling and, as in this case, the federal lawyer in reasonable reliance on state law assurances of timeliness is lulled into filing an untimely federal habeas petition. It is nothing short of a procedural trap to insist that prisoners study and hew to state timeliness rules for purposes of one habeas doctrine (procedural default), and then in a related but separate context (AEDPA tolling) to discard and ignore the state procedural rules. *See Griffith* v. *Rednour*, 623 F.3d 1166 (7th Cir. 2010) (Hamilton, J., dissenting from order denying rehearing en banc); *see also Clark* v. *Tansy*, 13 F.3d 1407, 1409 (10th Cir. 1993) (recognizing that habeas procedures should be construed so as to avoid "procedural trap[s] created by the intricacies of habeas corpus law").

When the primacy of state rules is enforced only haphazardly, the costs are borne, both by the comity and federalism goals of AEDPA, and by the unwary prisoner caught in the crossfire. AEDPA has brought renewed focus and enforcement to state procedural rules. But there is an implicit *quid pro quo*. The State's procedural rules are regarded as sufficient to trump a federal court's interest in correcting constitutional error, but, likewise, a prisoner's reliance on valid state procedural rules must be respected, and not subject him to penalties under

AEDPA. That is to say, the procedural rules cannot create a sort of one-way federalism whipsaw that threatens to punish a prisoner for not complying with state law, in the form of a default, for example, and threatens to punish him for relying on state law in determining what is timely for purposes of tolling the federal statute of limitations. *See Carter* v. *Litscher*, 275 F.3d 663, 665 (7th Cir. 2001) (recognizing the need to avoid procedural traps regarding AEDPA tolling in a related context).

B. Procedural Traps Depriving A Prisoner Of Federal Habeas Review Raise Serious Constitutional Issues.

Amici agree with Petitioner that this Court's precedent provides an unequivocal command that federal courts apply AEDPA's tolling rule in a manner that affords substantial deference to state procedures. Cert. Pet. 14–18. However, to the extent the language of § 2244(d)(2) remains ambiguous, the canon of constitutional avoidance instructs that such ambiguity should be construed so as to avoid arguable unconstitutionality. *See Hooper* v. *California*, 155 U.S. 648, 657 (1895) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.").

The Seventh Circuit's interpretation of § 2244(d)(2) is of arguable unconstitutionality. Insofar as the Seventh Circuit creates a trap — penalizing reasonable reliance on state procedural rules regarding timeliness by refusing AEDPA tolling — the holding not only conflicts with the other circuits, Cert. Pet. 19–22, but evinces an unconstitutional application of § 2244(d)(2). *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only

the conclusion that it is unconstitutional but also grave doubts upon that score.").

Procedural unfairness is generally at odds with the constitutional guarantees of due process, and this is no less true in the context of federal habeas corpus deprivations. Indeed, the Constitution's anti-suspension clause, U.S. Const. art. I, § 9, cl. 2, ensures that procedures depriving a prisoner entirely of federal habeas review receive careful federal scrutiny. *Cf. Boumediene* v. *Bush*, 553 U.S. 723 (2008). This does not suggest, of course, that every procedure barring federal review runs afoul of the suspension clause. *Id.* at 791 (citing AEDPA authorities for the proposition that prisoners who fail to diligently pursue remedies may be precluded); *see also Felker* v. *Turpin*, 518 U.S. 651 (1996). However, where, as here, the mechanism for precluding federal habeas review rests entirely on inequitable procedure, or what might be perceived as a trap, constitutional concerns arise. *Id.* at 664 (accepting limitations on federal review that fall within equitable limits); *see also Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998) (avoiding a potential habeas trap by holding that re-filing of habeas petition is not subject to successive petition limits when initial dismissal was for technical, procedural failures such as non-exhaustion).

Limitations on federal habeas review, particularly the complete preclusion of federal review, are constrained by equitable principles. *Cf. Holland* v. *Florida*, 130 S. Ct. 2549, 2561 (2010) (recognizing that "equitable principles" govern habeas corpus generally, and the preclusion of federal habeas review in particular); *Lee* v. *Kemna*, 534 U.S. 362, 376 (2000) (rejecting the "exorbitant" and inequitable application of a procedural barrier to federal review);

Felker, 518 U.S. at 664. Consistent with this view, courts have not found general constitutional fault with the application of the procedural default doctrine, which effects a complete preclusion of federal review; however, the law governing procedural default recognizes that unfairness in the default system, or a default that seems premised on a trap or trick is invalid and constitutionally dubious. *See Ford* v. *Georgia*, 498 U.S. 411, 419–25 (1991) (holding that state's procedural rule cannot be applied retroactively to effect a default); *James* v. *Kentucky*, 466 U.S. 341, 348 (1984); *Henry* v. *Mississippi*, 379 U.S. 443, 447–48 (1965); *see also* Larry Yackle, *Postconviction Remedies* § 6:19 n.79 (1981).

If the state of Illinois had sought to default Griffith's claims and deprive him of a federal forum on the basis of a novel or unfair state law, federal habeas review would not be precluded. *See, e.g.*, *Walker* v. *Martin*, __S. Ct. __, 2011 WL 611627 *9 (Feb. 23, 2011) (recognizing that freakish or unexpected procedural bars are impermissible); *see also Oliver* v. *Wainwright*, 795 F.2d 1524, 1529-30 (11th Cir. 1986) (emphasizing that "unfair surprise" or inconsistent rules cannot bar federal review). The preclusion of federal review in this case by the Seventh Circuit is at once novel and unfair; *amici* have found no cases where a state prisoner's federal habeas review was denied on the basis of his reliance on a retroactive extension of the timeliness requirements, and the unfairness of this procedure is set forth in the preceding section of this brief. Accordingly, principles of equity grounded in the Constitution prohibit the deprivation of federal habeas corpus review in the circumstances presented in this case. *Cf. Stone* v. *Powell*, 428 U.S. 465, 494–

95 (1976) (precluding federal review in conditions that are sufficiently "full and fair"); *cf.* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) (examining the relationship between fairness and due process in a related context).

Additional indirect support for the conclusion that the preclusion of federal review in this case is inappropriate in view of the relative equities can be found in lower court decisions. Chief Judge Alex Kozinski of the Ninth Circuit, for example, has endorsed the conclusion that AEDPA's constraints are tempered by the need for fair process. *Taylor* v. *Maddox*, 366 F.3d 992, 999–1000 (9th Cir. 2004) (Kozinski, J.). Accordingly, Judge Kozinski, writing for a unanimous panel of the Ninth Circuit Court of Appeals, has concluded that the centerpiece of AEDPA-deference, § 2254(d)(1), does not apply when the state procedures were not full and fair. That is to say, the critical deference enshrined in this Court's AEDPA jurisprudence, *see, e.g.*, *Williams* v. *Taylor*, 529 U.S. 362, 374 (2000), is not applicable when the petitioner has been subjected to an unfairness or procedural trap. *Maddox*, 366 F.3d at 1000 (noting that a "defective" procedure is not entitled to AEDPA deference).

Reasoning by analogy to Judge Kozinski's approach, *amici* submit that procedural traps or inequities created on the federal side represent an equal, if not greater, harm to AEDPA's purpose. Just as state-generated procedural inequities in a particular case preclude federal deference under § 2254(d)(1), so too must federally-created procedural traps or unfairness constrain the ability of AEDPA's statute of limitations, per § 2244(d)(2), to preclude entirely federal review. The complete absence of

federal review in the face of procedural inequity raises substantial due process and suspension clause issues.[7]

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The Seventh Circuit's interpretation of § 2244(d)(2) is in considerable tension with the provision's goal of promoting comity and federalism, it creates the potential for arguably unconstitutional procedural "traps for unwary petitioners," and, as discussed in the petition for certiorari, it is inconsistent with the settled law of numerous other circuits. This trifecta of concerns — procedural unfairness, threats to comity and federalism, and a circuit split as to the application of this Court's cases — justify review by this Court.

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7 Deference to states on substance, (§ 2254(d)(1)), and procedure, (exhaustion, procedural default, and statute of limitations) is an overarching concept of modern habeas law and ought to apply whether it hampers review or facilitates federal review.

CONCLUSION

WHEREFORE, for the foregoing reasons, *amici curiae* urge the Court to grant Griffiths' petition for a writ of certiorari and reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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